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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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| PATRICK COTTINI,<br>Plaintiff and Appellant,<br>v.<br>ENLOE MEDICAL CENTER,<br>Defendant and Respondent. | C062904<br>(Super.Ct.No. 143355) |

Plaintiff Patrick Cottini appeals from two pretrial orders denying his motion to disqualify the law firm of LaFollette, Johnson, De Haas, Fesler & Ames (LaFollette Johnson) from representing defendant Enloe Medical Center (Enloe) in an action alleging negligence and abuse of a dependent adult. Cottini also appeals from a separate pretrial order in which the trial court granted Enloe's motion for discovery sanctions and reserved jurisdiction to set the amount of sanctions at the conclusion of the case.

As we shall explain, Cottini's interlocutory appeal from the sanctions order is not properly before us because the order does not impose monetary sanctions in an amount exceeding $5,000 (Code Civ. Proc., § 904.1, subd. (a)(12); further section references are to the Code of Civil Procedure unless otherwise specified); nor is it appealable as a final judgment on a matter that is collateral to the general subject of the litigation.

While Cottini's interlocutory appeal challenging the court's denial of his motion to disqualify the LaFollette Johnson law firm is properly before us, we conclude that he has failed to demonstrate reversible error.

Thus, we shall dismiss the purported appeal from the sanctions order and affirm the orders denying Cottini's motion to disqualify the LaFollette Johnson law firm.

## BACKGROUND

Cottini is a 36-year-old man with incomplete quadriplegia who was brought to Enloe after sustaining a shoulder injury while training for the Paralympics. He sued Enloe for negligence and abuse of a dependent adult, claiming that he suffered a severe pressure sore (decubitus ulcer) on his coccyx caused by the failure of Enloe employees to regularly reposition him, that he did not receive adequate bowel care, and that he also suffered a traumatic injury to his scrotum.

Attorney Joseph M. Earley III represented Cottini in the lawsuit. Attorney Julie Clark Martin of the LaFollette Johnson law firm represented Enloe.

*Discovery Sanctions*

In preparation for trial, Attorney Martin sought to depose Cottini and his parents, Bill Cottini (father) and Connie Cottini (mother), who were percipient witnesses to the claimed negligent conduct of Enloe's employees and the alleged resulting injuries. The parties agreed that Cottini would be deposed first. They disagreed as to whether father and mother would be allowed to attend their son's deposition. Martin expressed concern that the "independent recollection" of Cottini's parents and "the integrity of their testimony" would be "jeopardized by permitting them to attend." Attorney Earley countered by explaining that, "absent a protective order excluding 'designated persons' from attending the deposition pursuant to [section] 2025.420," Cottini and his parents would be present at the scheduled time. After an unsuccessful attempt to reschedule the depositions in order to depose Cottini's parents first, defendant Enloe filed an ex parte application requesting a protective order excluding Cottini's parents from attending their son's deposition until they were deposed.

The trial court granted the application and ordered that "[e]ach of [Cottini's] parents shall be excluded from attending any deposition in this case until he or she has been deposed." At the hearing on the ex parte application, the court stated it was ordering the parents excluded from Cottini's deposition in order to prevent his testimony from "taint[ing] their testimony."

Cottini was deposed a week later. While his parents did not attend the deposition, Cottini's attorney, Earley, brought a video camera to record the deposition and allowed both parents to watch

the video prior to their depositions. During his deposition, father explained that he watched the video to "make[] sure that [his] testimony [was] accurate." Enloe's attorney, Martin, then reminded Earley that the purpose of the order was to avoid any "taint[ing]" of the parents' testimony, and scolded him for his "blatant violation of the spirit of the court order." Martin added: "Never in my wildest dreams did I think that you would sit here and video tape his testimony and then show it to Mr. and Mrs. Cottini." Earley responded: "Never in the world would I think that any judge would have precluded a witness from attending a deposition. They're not allowed to do that. . . . [¶] . . . [¶] . . . You pulled that one off, and that's fine, but no one ever said they couldn't watch the depo or read the transcript, so that's what they did."

Defendant Enloe moved to dismiss the lawsuit for violation of the protective order and, in the alternative, to preclude Cottini's parents from testifying at trial. Enloe also sought monetary sanctions in the amount of $9,834. After hearing oral argument, the court informed Attorney Earley that the court found it to be "disturbing" that he "engaged in a subterfuge to defeat . . . the purpose of the Court's order." However, the court denied the motion to dismiss and the motion to exclude the testimony of Cottini's parents. Instead, the court ordered that the jury would be informed "there was a protective order in place prior to [Cottini's] deposition that prohibited [his parents] from attending that deposition so that their testimony would not be tainted by [his] testimony," and that this order was violated when

Earley videotaped the deposition and allowed both parents to view their son's testimony prior to their depositions. The court also granted the motion to impose sanctions, but reserved jurisdiction to set the amount at the conclusion of the case.

*Attorney Disqualification*

About a month after Enloe's attorney, Martin, discovered that Cottini's parents had watched the video of their son's deposition, Cottini's attorney, Earley, sent Martin a letter demanding that the LaFollette Johnson law firm cease its representation of Enloe due to a conflict of interest.

The alleged conflict of interest was based on a conversation Earley had with another attorney, Cameron Whitehead, concerning the Cottini case prior to Whitehead's employment with the LaFollette Johnson law firm. Whitehead had served as co-counsel with Early in several other matters, and Earley claimed that he had engaged in "substantive discussions" with Whitehead concerning the Cottini case because Earley was considering asking Whitehead to associate into the case at a later time. According to Earley, his relationship with Whitehead was "close, continuous, and personal," and, although he never referred to the Cottini case by name (referring to it only as "the quad-decub case"), he gave Whitehead information about "the identity and opinions of [Cottini's] standard of care consultant," believing that, "unless otherwise addressed, conversations regarding cases would remain confidential." Earley acknowledged, however, that when this information was allegedly divulged, he was aware that Whitehead was considering employment with a defense firm in Sacramento (Earley claimed not to know which defense firm) and that

Whitehead therefore "needed to disassociate from two cases in which he and [Earley] were formally associated as co-counsel."

When Earley discovered that Whitehead's new employer was the LaFollette Johnson law firm, he informed Cottini of the perceived conflict of interest, and Cottini refused to waive the conflict. Earley then informed Martin that her law firm was disqualified from representing Enloe.

Declining to withdraw from representing defendant Enloe, Martin pointed out the following: The conversation at issue was initiated by Whitehead to inform Earley that Whitehead was considering employment with a defense firm and to ask Earley if he would be interested in taking over several of Whitehead's cases. The reason Earley's "quad-decub case" came up was that Whitehead had a similar case he was asking Earley to take over. Although Earley mentioned the name of an expert while talking with Whitehead, no information was exchanged regarding that expert's opinions. Thus, Martin concluded that her law firm was not disqualified from representing Enloe because (1) the fact that Earley divulged the name of Cottini's expert to Whitehead did not create a de facto attorney-client relationship between Whitehead and Cottini, (2) no confidential information was shared with Whitehead, and (3) even if the name of the expert qualified as a confidential communication, this information would no longer be confidential in two weeks when the parties were scheduled to disclose their experts.

Cottini brought an ex parte motion seeking an order staying discovery, continuing the trial, and disqualifying the LaFollette Johnson law firm. Enloe opposed the motion. Attorney Earley

submitted two declarations in support of the motion. Whitehead apparently prepared a declaration in opposition to the motion, but it was inadvertently omitted from the trial court record. At the hearing on the motion, Enloe offered to provide the court with a copy of Whitehead's declaration, and also argued that Earley's declarations failed to demonstrate that sufficient confidential information was disclosed to create an attorney-client relationship between Whitehead and Cottini.

The trial court did not receive Whitehead's declaration into evidence, but agreed there was "not sufficient evidence to create an attorney-client relationship nor enough of a disclosure to outweigh the right of [Enloe] to choose to have an attorney of their choice represent them." This ruling was made without prejudice to allow Earley to "bring forward another declaration that would be considered in camera."

The trial court also issued a protective order directing that, "if [Enloe] is able to discover the identity of the expert and [Cottini] decides not to call him as a witness at trial, [Enloe] would not be allowed to call him as a witness or refer to his findings or conclusions if they know what they are. This expert would be able to testify if [Cottini] call[s] him as a witness."

The court later granted Cottini's application for in camera review of two supplemental declarations prepared by his attorney, Earley. These declarations were not made a part of the appellate

record.[1] The appellate record also does not include a reporter's transcript of the in camera proceeding. Whitehead was available to testify in camera in opposition to the renewed motion to disqualify LaFollette Johnson, but he was not called upon to do so. After reviewing the supplemental declarations in camera, the court ruled "there was no material confidential information disclosed to Mr. Whitehead in the conversation that forms the basis for the motion."

DISCUSSION

I

Cottini's contends that he did not violate the court's order precluding his parents from attending his deposition and that sanctions were therefore improper. The contention is not properly before this court.

"Sanctions for discovery abuse are not separately appealable unless they exceed $5,000. [Citations.] They otherwise can be reviewed only in the appeal from the final judgment in the main action. [Citation.]" (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161; § 904.1, subd. (a)(12) [an appeal may be taken "[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)"]; § 904.1, subd. (b) ["Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the

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[1] Cottini filed a motion to augment the record on appeal with these supplemental declarations. We denied this motion.

discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ"].)

Here, the trial court granted defendant Enloe's motion to impose discovery sanctions, but reserved jurisdiction to set the amount at the conclusion of the case. While, as Cottini points out, Enloe has *asked* for $9,834 in monetary sanctions, and although the trial court has indicated that "substantial sanctions" shall be imposed for Cottini's violation of the protective order, the court has yet to impose any specific amount. Even assuming that the trial court will issue an order directing payment of monetary sanctions in excess of $5,000 at the conclusion of the case, such an order will be properly appealable only when it is actually entered.

Also without merit is Cottini's assertion that the portion of the order directing that the jury would be told of the discovery violation prior to the testimony of his parents is appealable because "the ordered instruction to the jury is final and unequivocal." Cottini has failed to support this assertion with any reasoned argument or citation to legal authority; thus, we deem it to have been forfeited. (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001, fn. 4; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In any event, Cottini is wrong to suggest that the "final" and "unequivocal" nature of the ordered instruction renders it appealable. Under the final judgment rule, there can be no direct appeal except from a final judgment which in effect terminates the lawsuit and finally determines the rights of the parties in

relation to the matter in controversy. (*Ponce-Bran v. Trustees of Cal. State University* (1996) 48 Cal.App.4th 1656, 1661; *Maier Brewing Co. v. Pacific Nat. Fire Ins. Co.* (1961) 194 Cal.App.2d 494, 497; § 577.) While there is an exception to the final judgment rule for collateral orders, "that exception applies *only* '[w]here the trial court's ruling on a collateral issue "is substantially the same as a final judgment in an independent proceeding" [citation], in that it leaves the court no further action to take on "a matter which . . . is severable from the general subject of the litigation."' [Citation.]" (*San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 Cal.App.4th 296, 300.) However, "[i]f an order is '"important and essential to the correct determination of the main issue"' and '"a necessary step to that end,"' it is not collateral. [Citation.]" (*Ibid*.)

The issue of instructing the jury regarding the discovery violation involves the amount of credence the jury will ultimately give to the testimony of Cottini's parents concerning Enloe's alleged negligence, which is not severable from the general subject matter of the litigation to establish whether Enloe injured Cottini through its negligence. Thus, the ordered jury instruction is not appealable as a collateral order.

II

The orders denying Cottini's motion to disqualify the LaFollette Johnson law firm are appealable orders. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 215; *Reed v. Superior Court* (2001)

92 Cal.App.4th 448, 452.)[2] However, Cottini has failed to show reversible error.

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion.

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[2] Orders denying attorney disqualification are appealable for two reasons: "(1) Such an order is a final order on a collateral matter. 'The matter of disqualification of counsel is unquestionably collateral to the merits of the case. . . . Because the trial court's order denying [a litigant's motion to disqualifying opposing counsel leaves] nothing further of a judicial nature for a final determination of his rights regarding opposing counsel, the order [is] final for purposes of appeal.' [Citation.] (2) Such an order is, in effect, an order refusing to grant an injunction to restrain counsel from participating in the case. [Citations.]" (*Reed v. Superior Court*, *supra*, 92 Cal.App.4th at pp. 452-453, quoting *Meehan v. Hopps*, *supra*, 45 Cal.2d at pp. 215-217; § 904.1, subd. (a)(6) [appeal may be taken "[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction"].)

[Citation.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 (hereafter *SpeeDee Oil*).)

The trial court's first ruling denying the disqualification motion was based on Cottini's failure to provide "sufficient evidence to create an attorney-client relationship" between himself and Attorney Whitehead, and on his failure to demonstrate "enough of a disclosure to outweigh the right of [Enloe] to choose to have an attorney of their choice represent [it]." However, this ruling was made without prejudice to allow Earley to "bring forward another declaration that would be considered in camera." The trial court then reviewed two supplemental declarations prepared by Attorney Earley and issued a second ruling denying the disqualification motion based on the court's finding that "no material confidential information" was disclosed to Whitehead. These declarations were not made a part of the appellate record, and this court later denied a request to augment the record. Nor was a reporter's transcript of the in camera proceedings made a part of the appellate record.

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Consequently, on appeal, it is the burden of the party challenging the judgment or order "to provide an adequate

record to assess error," and the failure to do so requires that the issue be resolved against him. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Because the appellate record does not contain Attorney Earley's supplemental declarations and, more important, because Cottini failed to include in the appellate record a reporter's transcript of the in camera proceedings, he is unable to show the trial court erred in concluding that no material confidential information was disclosed to Attorney Whitehead. In sum, we presume the court was correct in concluding no such information was disclosed and, thus, the court properly denied the motion to disqualify the LaFollette Johnson firm.

III

Cottini asserts that the two declarations initially provided to the trial court were sufficient to require disqualification of the LaFollette Johnson law firm, and that the trial court was wrong to require Earley to submit supplemental declarations disclosing the "confidences" given to Whitehead for in camera review. Hence, argues Cottini, "'error is apparent on the face of the existing appellate record,'" and we should reverse the ruling on the disqualification motion based on these initial two declarations. We are not persuaded.

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.]

Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.]" (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145.) Thus, in ruling on a motion to disqualify opposing counsel, a court must carefully examine several important interests, namely, "a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion." (*Ibid.*) But "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*Ibid.*)

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." [Citation.]' [Citation.] To this end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. [Citation.]" (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1146; Bus. & Prof. Code, § 6068, subd. (e)(1).)

"To protect the confidentiality of the attorney-client relationship, the State Bar Rules of Professional Conduct, rule 3-310 (rule 3-310) prohibits attorneys from accepting, without the

client's informed written consent, 'employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment.' [Citations.] Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. [Citation.] For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. [Citation.]" (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1146.)

"A related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. [Citation.] The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. [Citation.] Therefore, if an attorney--or more likely a law firm--simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies. With few exceptions, disqualification

follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other. [Citation.]" (*SpeeDee Oil*, *supra*, 20 Cal.4th at pp. 1146-1147.)

"'Before an attorney [or his law firm] may be disqualified from representing a party in litigation because [the] representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's [or his law firm's] disqualification was or is "represented" by the attorney [or law firm] in a manner giving rise to an attorney-client relationship. [Citations.]' [Citation.] The burden is on the party seeking disqualification to establish the attorney-client relationship. [Citation.]" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729; *Maruman Integrated Circuits, Inc. v. Consortium Co.* (1985) 166 Cal.App.3d 443, 447; *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 591-592 ["it is confidences acquired in the course of an attorney-client relationship which are protected by preventing the recipient of those confidences from representing an adverse party"].) Accordingly, the "mere exposure to confidential information of the opposing party does not require disqualification." (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 841; *Maruman Integrated Circuits, Inc. v. Consortium Co.*, *supra*, 166 Cal.App.3d at p. 448.)

*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 (hereafter *Zimmerman*) is instructive. Following a judgment of dissolution, the appellant in *Zimmerman* filed a complaint against respondent, her former husband, seeking her community property

share of certain business proceeds. Seeking counsel to oppose a summary judgment motion filed by respondent, the appellant had a 20-minute phone conversation with Attorney Kenneth Gack, during which she "'outlined and explained [her] side of the case fully to him'" and "'told him everything [she] thought was pertinent to the case.'" (*Id.* at p. 560.) Gack then "provided appellant 'his initial impression and opinion about the case,' and recommended that she seek representation by 'someone with domestic relations expertise.'" Gack did not remember speaking to appellant; and, contrary to his usual practice with prospective clients, he took no notes during the conversation. (*Ibid.*) After respondent's attorney, Lawrence Bernheim, became a partner of Gack in the law firm of James, Gack, Bernheim & Freeman, appellant moved to disqualify the firm from representing respondent. (*Id.* at p. 561.)

The Court of Appeal affirmed denial of the disqualification motion. It acknowledged that "Bernheim is representing respondent in the same case about which appellant previously consulted with Gack," but concluded that the nature of appellant's relationship with Gack was not sufficient to warrant disqualification, and appellant had not shown that confidential information was disclosed during the initial consultation. (*Zimmerman*, *supra*, 16 Cal.App.4th at pp. 563-564.) It explained: "Here, appellant was never represented by Gack in this action; she merely engaged in a preliminary consultation with him. While Gack may have offered appellant his initial impressions of the case, he obviously was not called upon to formulate a legal strategy and, by the very limited nature of his contact with appellant, could not have gained

detailed knowledge of the pertinent facts and legal principles. . . . If Gack provided representation to appellant at all, it was clearly of a preliminary and peripheral nature. [Citation.] He did not even recall the brief conversation with appellant, and took no notes of it. He performed no work for appellant; rather, he referred her to an attorney with 'domestic relations expertise.' The record before us shows the most minimal involvement by Gack in the case. [Citation.]" (*Id.* at pp. 564-565, fn. omitted, citations omitted.)

The Court of Appeal further explained: "Appellant has also failed to show disclosure of confidential information during the preliminary consultation. Appellant has declared that she 'outlined' the case for Gack by providing him with all 'pertinent' information, but no confidential disclosures have been claimed. Nor does it appear from the nature of appellant's relationship with Gack, brief and insubstantial as it was, that confidential information material to the current dispute would normally have been imparted to the attorney." (*Zimmerman*, *supra*, 16 Cal.App.4th at p. 565.) The Court of Appeal also agreed with the trial court's conclusion that "appellant's 'conclusory' declaration failed to establish a relationship with Gack 'from which it would be reasonable to infer' disclosure of confidential information." (*Ibid.*)

Cottini's contacts with Attorney Whitehead are even more tenuous than the contacts in *Zimmerman*. The appellant in *Zimmerman* sought Gack's assistance in her lawsuit against her former husband, and engaged in a preliminary consultation with him for that very

purpose. Here, the most that can be gleaned from Attorney Earley's initial declarations is that, during "substantive discussions" about an unspecified "quad-decub case," Whitehead was informed about the identity and conclusions of an expert whom Earley had chosen to consult and was also informed about "strategy." While Earley also declared that he was thinking about asking Whitehead to associate into the case, he simultaneously acknowledged that he knew Whitehead was seeking employment with a defense firm and needed to disassociate from two cases in which they were already associated as co-counsel. And while Earley stated generally that Whitehead's "valued opinions were routinely sought, discussed and adopted," there is no assertion that his legal opinion was sought *regarding the Cottini case*. Moreover, while Whitehead's declaration was not received into evidence, Cottini admits in his reply papers that Whitehead did not remember discussing any expert opinions with Earley, nor did he recall any other instances where "'case specifics'" were discussed.

Thus, all the trial court had in deciding the disqualification motion were conclusory statements about "substantive discussions" that were purportedly entered into between Earley and Whitehead concerning "strategy" and "the identity and opinions" of an expert Earley had chosen to use in an unspecified "quad-decub case." From this, the trial court had no basis to determine whether this information was given to Whitehead to enable him to assist in representing Cottini, or whether this information was instead foisted upon Whitehead while he sought to disassociate from two cases in order to pursue employment with a defense firm. As was

the situation in *Zimmerman*, Cottini failed to show that the nature of his relationship with Whitehead was sufficient to warrant disqualification.

Indeed, Cottini concedes he did not establish an attorney-client relationship with Whitehead. Nevertheless, relying on *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210 (hereafter *Roush*), he asserts that such a relationship was not required in order to disqualify the Lafollette Johnson law firm. He is wrong. *Roush* involved a situation in which two employees (Roush and Kilgore) retained the same law firm (Markowitz) to sue their common employer (Seagate), although the lawsuits pursued by these employees were distinct. Later, Kilgore fired Markowitz, hired another attorney to pursue his lawsuit against Seagate, and ultimately entered into a settlement agreement under which he promised to provide Seagate's counsel (Morrison) with certain documents pertaining to Roush's employment at Seagate and to waive any attorney-client privilege with respect to his discussions with Markowitz concerning Roush's case against Seagate. (*Id.* at pp. 215-217.) Roush moved to disqualify Morrison, arguing she and Kilgore "enjoyed a joint privilege that could not be waived absent consent from both of them and, that in extracting [this] promise from Kilgore, Morrison improperly obtained Roush's confidential information." (*Id.* at p. 217.)

Analogizing the situation in *Roush* to cases in which counsel obtains confidential information from an expert with whom opposing counsel has previously consulted (e.g., *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067), the Court of Appeal

held Roush had not carried her burden of "show[ing] that Kilgore possessed [her] confidential information materially related to these proceedings," and affirmed the trial court's denial of her disqualification motion. (*Roush*, *supra*, 150 Cal.App.4th at pp. 220-221.) As the court explained, "Roush and Kilgore were not joint clients of Markowitz" such that they possessed a jointly held privilege, and Roush failed to show that "disclosure of [her] protected information to Kilgore was necessary to her case." (*Id.* at p. 225.) "The necessity for disclosure to an expert consultant is usually self-evident. That is not so here. We cannot divine the necessity for sharing confidential attorney-client and attorney work product information with a percipient witness, which, as far as the evidence discloses, was Kilgore's only relationship to Roush's case." (*Ibid.*) Thus, any such information disclosed to Kilgore was no longer confidential. (*Ibid.*)

*Roush* does not assist Cottini. The key to the expert witness cases relied upon in *Roush* is the principle that the attorney-client privilege embraces "statements from counsel to the expert which disclose confidential information communicated by the client when disclosure is reasonably necessary to further the attorney's representation of the client's interest(s)." (*Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at pp. 1078-1079.) Here, Attorney Earley's initial declarations do not establish that Attorney Whitehead was consulted as an expert in order to further Earley's representation of Cottini. Indeed, because Whitehead is an attorney, if his legal opinion was sought about the Cottini case, he would have established an attorney-client relationship

with Cottini, and there would be no need to resort to expert witness analogies. However, as already indicated, while Earley declared that Whitehead's advice was routinely sought, there is no assertion in either declaration that Whitehead's legal advice was sought *regarding the Cottini case*. Moreover, as Whitehead was not even given the name of the case at the time of the alleged disclosures, the trial court was more than justified in concluding that Cottini had failed to carry his burden.

In sum, we conclude that Earley's initial declarations were not sufficient to establish that the nature of Whitehead's relationship with Cottini warranted disqualification.

Moreover, the trial court was not required to accept as true the conclusory statements in Earley's declarations asserting that confidential information was disclosed. (See *Zimmerman*, *supra*, 16 Cal.App.4th at p. 565.) Notwithstanding Cottini's claim to the contrary, *Roush* does not stand for the proposition that a "generic representation such as 'potential strategies, potential evidence, and potential witnesses' sufficiently identifie[s] the confidential nature" of the information disclosed. *Roush* actually states that such a statement provides "slim support" for the claim that confidential information was disclosed, and merely "reflects the sharing of information that *may* be protected" by the attorney-client privilege. (*Roush*, *supra*, 150 Cal.App.4th at pp. 221-222, italics added.) *Roush* then held that, even if information was disclosed to Morrison that would have been confidential absent disclosure to Kilgore, this information did not remain confidential following the disclosure to Kilgore. (*Id.* at pp. 223-225.) Thus,

*Roush* did not decide whether the generic statements contained in the declaration submitted by Roush's counsel were sufficient to establish that confidential information was disclosed to Kilgore. "[C]ases are not authority for propositions not considered." (*LEG Investments v. Boxler* (2010) 183 Cal.App.4th 484, 496-497, fn. 5.)

While it was undisputed that the name of an expert was divulged to Whitehead, this alone did not require disqualification. The "mere exposure to confidential information of the opposing party does not require disqualification." (*Neal v. Health Net, Inc.*, *supra*, 100 Cal.App.4th at p. 841.) Rather than disqualify the LaFollette Johnson firm, the trial court issued a protective order directing that, "if [Enloe] is able to discover the identity of the expert and [Cottini] decides not to call him as a witness at trial, [Enloe] would not be allowed to call him as a witness or refer to his findings or conclusions if they know what they are. This expert would be able to testify if [Cottini] chooses to call him as a witness." This protective order was sufficient to protect Cottini, while also protecting Enloe's right to counsel of its choice. (*Id.* at p. 844 [client confidences can be protected by less drastic measures such as protective orders].)

Simply put, it was well within the trial court's discretion to deny Cottini's disqualification motion and allow Earley to submit supplemental declarations for in camera review. As we have already explained, we have no basis to review the trial court's ruling on the disqualification motion following in camera review of these supplemental declarations. Consequently, we must presume that the record would support the trial court's ruling.

DISPOSITION

Cottini's purported appeal from the sanctions order is dismissed. The orders denying Cottini's motion to disqualify the LaFollette Johnson law firm are affirmed. Cottini shall reimburse Enloe for its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

SCOTLAND, Acting P. J.*

We concur:

BLEASE, J.

HULL, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.